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IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF NORTHWEST WOMEN'S LAW CENTER, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, NATIONAL CENTER FOR LESBIAN RIGHTS, AND THE WOMEN'S LAW CENTER OF MARYLAND, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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39pp

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE WASHINGTON STATE THIRD PARTY VISITATION STATUTE, WHICH ALLOWS FOR VISITATION BY ANY PERSON AT ANY TIME, IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE 3

II. THIRD PARTY VISITATION STATUTES SUCH AS WASHINGTON'S ARE CONSTITUTIONAL WHEN APPLIED TO INDIVIDUALS WITH *DE FACTO* PARENTAL RELATIONSHIPS 6

III. NARROWLY CIRCUMSCRIBING COURT ACCESS BY THIRD PARTIES IS ESSENTIAL TO PROTECT PARENTAL AUTONOMY 12

A. LIMITED APPLICATION OF VISITATION STATUTES TO *DE FACTO* PARENTS MINIMIZES JUDICIAL USURPATION OF PARENTAL DECISION-MAKING ... 13

B. BROAD APPLICATION OF THIRD PARTY VISITATION STATUTES WILL FORCE PARENTS TO DEFEND AGAINST UNDESERVING APPLICANTS AND RESULT IN HARMFUL AIRING OF FAMILY DISPUTES..... 15

C. STATUTES THAT GIVE COURTS UNFETTERED DISCRETION OFTEN RESULT IN GENDER-BIASED DECISIONS..... 17

D. ASSUMPTIONS ABOUT THE BENEFITS OF GRANDPARENT VISITATION FREQUENTLY RESULT IN INTRUSIONS UPON PARENTAL AUTONOMY 20

E. BROAD APPLICATION OF THIRD PARTY VISITATION STATUTES CREATES AN ECONOMIC HARDSHIP FOR THE PARENT OPPOSING THE VISITATION..... 23

CONCLUSION..... 26

TABLE OF CITED AUTHORITIES

Cases

Barry v. Barrale,
598 S.W.2d 574 (Mo. App. 1980) 18

Benner v. Benner,
248 P.2d 425 (Cal. App. 1952)..... 18

Campbell v. Campbell,
896 P.2d 635 (Utah App. 1995)..... 20

Cleveland Board of Education v. LaFleur,
414 U.S. 632 (1974)..... 3

Cockrell v. Sittason,
500 So. 2d 119 (Ala. Civ. App. 1986) 18

Commonwealth ex rel. Miller v. Miller,
478 A.2d 451 (Pa. Super. Ct. 1984)..... 18, 20

Commonwealth ex rel. Zaffarano v. Genero,
455 A.2d 1180 (Pa. 1983) 18

Drennen v. Drennen,
557 N.E.2d 149 (Ohio App. 1988)..... 16

E.N.O. v. L.M.M.,
711 N.E.2d 886 (Mass. 1999)..... 8, 10

Frances E. v. Peter E.,
479 N.Y.S.2d 319 (N.Y. App. Div. 1984) 20

Herndon v. Tuhey,
857 S.W. 2d 203 (Mo. 1993)..... 5, 20

Hughes v. Hughes,
463 A.2d 478 (Pa. Super. 1983) 16

In re Custody of H.S.H.-K,
533 N.W.2d 419 (Wis. 1995)..... 8

In re Custody of Smith,
969 P.2d 21 (Wash. 1998) 13

In re Marriage of Weddel,
553 N.E.2d 213 (Ind. Ct. App. 1990) 18

Johansen v. Lanphear,
464 N.Y.S.2d 301 (N.Y. App. Div. 1983) 18

King v. King,
828 S.W.2d 630 (Ky. 1992)..... 20, 22

Kudler v. Smith,
643 P.2d 783 (Col. Ct. App. 1981)..... 18

Lehr v. Robertson,
463 U.S. 248 (1983)..... 8, 9

Michael H. v. Gerald D.,
491 U.S. 110 (1989)..... 7, 9

Moore v. City of East Cleveland,
431 U.S. 494 (1977)..... 7, 8, 9

Olepa v. Olepa,
391 N.W.2d 446 (Mich. Ct. App. 1986) 19

Pierce v. Society of Sisters,
268 U.S. 510 (1925)..... 3

Prince v. Massachusetts,
321 U.S. 158 (1944)..... 3, 4

Quilloin v. Walcott,
434 U.S. 246 (1978)..... 4, 9

Roberts v. Ward,
493 A.2d 478 (N.H. 1985)..... 20, 21

Roe v. Wade,
410 U.S. 113 (1973)..... 4

Santosky v. Kramer,
455 U.S. 745 (1982)..... 3

Sightes v. Barker,
684 N.E.2d 224 (Ind. App. 1997)..... 20

Smith v. Organization of Foster Families,
431 U.S. 816 (1977)..... 11

Stanley v. Illinois,
405 U.S. 645 (1972)..... 8

State v. Wanrow,
559 P.2d 548 (Wash. 1977)..... 19

Constitutional Authority

Fourteenth Amendment 3, 22

Statutory Authorities

R.C.W. 26.09.191 12

R.C.W. 26.10.160(3)..... 2, 23, 26

Other Authorities

American Bar Association Annual Meeting Provides Forum for Family Law Experts, 13 Fam. L. Rep. (BNA) 1512 (Aug. 25, 1987)..... 7

American Bar Association, Standing Committee on the Delivery of Legal Services, *Responding to the Needs of the Self-Represented Divorce Litigant* 1 (1994)..... 24

Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise Of the Nuclear Family Has Failed,* 70 VA. L. Rev. 879 (1984)..... 4

Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?,* 24 U. Louisville J. Fam. L. 393 (1985-86) ... 14

Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases,* 49 Okla. L. Rev. 29 (1996)..... 5, 20

Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law,* 26 Conn. L. Rev. 1315 (1994).....17, 18, 19, 22

Developments in the Law – Sexual Orientation and the Law, 102 Harv. L. Rev. 1508 (1989) 7

Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts 140 (1977)..... 24

Steven H. Miles and Allison August, *Courts, Gender and the "Right-to-Die",* 18 Law, Medicine and Health Care 85 (1990) 19, 20

Barbara L. Shapiro, *"Non-Traditional" Families in the Courts: The New Extended Family,*11 J. Am. Acad. Matrim. Law. 117 (1993)..... 6

U.S. Department of Labor, Women's Bureau, *Facts on Working Women* (visited Dec. 7, 1999) <http://www.dol.gov/dol/wb/public/wb-pubs>..... 24

This *amicus curiae* brief is submitted in support of the Northwest Women's Law Center, *et al.* By letters already filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE* [1]

Amici are public interest legal rights and advocacy organizations that seek to protect and advance the legal rights of women.[2]

This case is important to *Amici* because it involves a Constitutional issue of first impression: whether parental autonomy includes the right of parents to decide who their children will visit and under what circumstances. *Amici* acknowledge the importance of parental autonomy to ensure that parents can decide how to raise their children free from governmental interference. *Amici* recognize this need to protect parental rights because *Amici* have too often seen the rights of single mothers, who have few resources, trampled when an ex-boyfriend or a grandparent seeks to force visitation. *Amici* also recognize that governmental

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[1] Individual statements of interest of each *amicus* are attached hereto as Appendix A.

[2] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

interference may at times be necessary to protect the rights of non-biological co-parents, such as non-biological lesbian mothers, to maintain relationships with their children. *Amici* believe these individuals play a parent-like role in the child's life that is entitled to constitutional protection. The courts must protect and balance the legitimate interests of each where the best interest of the child is at stake.

SUMMARY OF ARGUMENT

The Washington Supreme Court properly concluded that Washington's third-party visitation statute, R.C.W. 26.10.160(3), is unconstitutional when applied to visitation petitions brought by third parties who do not have a *de facto* parental relationship with the child. A *de facto* parent is a person who has actually parented the child for a considerable time. *See infra,* p. 10-11. *De facto* parents differ from third parties who may play a significant but lesser role in a child's life. When third party visitation statutes are applied to third parties who are not *de facto* parents, the statute unconstitutionally interferes with parental autonomy.

Visitation petitions brought by *de facto* parents raise parental interests similar to those arising in custody and visitation disputes between biological parents. In such

cases, interference with the custodial parent's autonomy may be justified by the *de facto* parent's competing rights. When the Washington third party visitation statute is applied to those relatively limited cases involving *de facto* parents, the "best interest of the child" standard properly balances the competing parental interests and the statute is constitutional.

ARGUMENT

I. THE WASHINGTON STATE THIRD PARTY VISITATION STATUTE, WHICH ALLOWS FOR VISITATION BY ANY PERSON AT ANY TIME, IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

This Court has long recognized the constitutionally protected liberty interests of parents "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Parenting decisions are among the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974). Indeed, this right is so significant that it continues to exist even when parents lose custody of their children to the state. *Santosky v. Kramer*, 455 U.S. at 754. Constitutional

protection of parental autonomy strengthens the family "by encouraging parents to raise their children in the best way they can by making them secure in the knowledge that neither the state nor outside individuals may ordinarily intervene." Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. Rev. 879, 879-80 (1984).

The state may interfere with parental autonomy only through the exercise of its police or *parens patriae* powers. In *Prince v. Massachusetts*, 321 U.S. 158, this Court recognized there are circumstances in which the state as *parens patriae* has a compelling interest in protecting the safety of children and that this interest may justify the state's interference with parental autonomy. However, for such interference to be constitutional, it must be "narrowly drawn" to meet the state interest. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

The broad application of third party visitation statutes such as Washington's unconstitutionally infringes upon the constitutional rights of parents to the "custody, care and nurture of [their] child." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), quoting *Prince v. Massachusetts*, 321 U.S. at 166. The state lacks a compelling interest to infringe upon

parental autonomy where the third party petitioner is not a *de facto* parent. Requiring a parent (whether legal or *de facto*) to provide visitation with a third party forces a significant intrusion into parental autonomy. "[I]t is the day-to-day contact between parents and child, and the relationships grounded in that ordinary round of daily life which demand the Court's attention." Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 Okla. L. Rev. 29, 51 (1996). "Allowing the government to force upon an unwilling family a third party, even when the third party happens to be a grandparent, is a significant intrusion into the integral family unit." *Herndon v. Tuhey*, 857 S.W.2d 203, 212 (Mo. 1993) (Covington, J., dissenting). Such an intrusion usurps the parent's role in directing the child's upbringing.

Because the state lacks a compelling interest in forcing parents to defend visitation petitions against third party petitioners who are not *de facto* parents, Washington's statute is unconstitutional if applied to permit such intrusions.

II. THIRD PARTY VISITATION STATUTES SUCH AS WASHINGTON'S ARE CONSTITUTIONAL WHEN APPLIED TO INDIVIDUALS WITH *DE FACTO* PARENTAL RELATIONSHIPS.

Nineteenth century notions of family and parenthood do not adequately reflect the reality of contemporary society or the needs of children and their families. Within the last three decades, this country witnessed "a dramatic erosion of the traditional concept that the 'family' is a heterosexual man and woman, who bear and raise children inside the legal institution of marriage." Barbara L. Shapiro, *"Non-Traditional" Families in the Courts: The New Extended Family*, 11 J. Am. Acad. Matrim. Law. 117 (1993). Gone are the days of old-fashioned family configurations comprising one mother and one father who are married to one another for the rest of their lives. In today's society, men and women marry, divorce, and remarry. They cohabit and raise children together without ever marrying. Grandparents raise their grandchildren when one or more of the parents is unavailable. Lesbian and gay partners live together and raise their children together without the ability to marry, even if they would choose to do so.[3]

[3] Family Pride Coalition, an organization whose members are individual and families including gay and lesbian parents and blended

For more than two decades, this Court has recognized that the constitutional notion of "parent" is not limited strictly to biological or adoptive parents. In fact, the Constitution protects those who have actually parented the child, whether biologically related to the child or not. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents **sharing** a household along with parents and children has roots equally venerable and equally deserving of constitutional protection." *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (emphasis added). "Decisions concerning child rearing, which [many cases] have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives . . . who may take on **major** responsibility for the rearing of the children." *Id.* at 505 (emphasis added). *See also*, *Michael H. v. Gerald D.*, 491 U.S. 110, 123, n.3 (1989) (the Constitution protects "the household of unmarried parents

and extended families, estimates there are approximately two million gay and lesbian parents raising three to five million children under the age of eighteen. *See also, Developments in the Law – Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1629 (1989) (estimating that three million lesbian and gay men in the United States are parents) (citing *American Bar Association Annual Meeting Provides Forum for Family Law Experts*, 13 Fam. L. Rep. (BNA) 1512, 1513 (Aug. 25, 1987)).

and their children"); *Lehr v. Robertson*, 463 U.S. 248 (1983) (*de facto* parent is entitled to substantial due process protection, but mere existence of biological link does not merit equivalent protection); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (noting that bonds arising in unmarried families are "often as warm, enduring, and important as those arising within a more formally organized family unit"); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999), cert. denied *L.M.M. v. E.N.O.*, -- S.Ct. --, 1999 WL 783931, 68 USLW 3323, 68 USLW 3326 (U.S. Mass. Nov. 15, 1999) (court has equity power to award visitation to non-biological lesbian mother who is *de facto* parent; visitation does not violate biological mother's constitutional right to parental autonomy); *In re Custody of H.S.H.-K*, 533 N.W.2d 419 (Wis. 1995) (non-biological lesbian mother may seek visitation with child she co-parents if she can establish a *de facto* parent relationship and that biological mother is denying visitation).

In *Moore* and other noted cases acknowledging the rights of *de facto* parents to assert parental rights, this Court reviewed the nature of the relationship between the *de facto* parent and the child(ren), not solely the presence or absence of a biological link. When the *de facto* parent held himself out as the "natural" parent, this Court acknowledged the

importance of the relationship and accorded it constitutional protection. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978). Even when the *de facto* parent knew she was not the natural parent, but had taken a parent-like role in the child's life, this Court held that the Constitution protects such relationships. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

Conversely, where biological parenthood is unaccompanied by actual caregiving, biology will not solely determine the parent's constitutional interest in parental decision-making. *See, Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (constitutional to deny biological father parental rights when *de facto* father lived with biological mother and raised child as his own); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (same); *Lehr v. Robertson*, 463 U.S. 248 (1983) (distinguishing mere biological tie from actual exercise of parental responsibility). Biological parenthood alone is not determinative of parenthood, and non-biological parents who have established a *de facto* parental relationship are entitled to constitutional protection as parents.

Recognizing a *de facto* parent's rights to visitation despite the objections of the biological parent does not

impermissibly interfere with parental autonomy; furthermore, that recognition advances important constitutional rights of the child and the *de facto* parent.

> The recognition of de facto [sic] parents is in accord with notions of the modern family. An increasing number of same gender couples . . . are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto [sic]. Thus, the best interests calculus must include an examination of the child's relationship with both his legal and de facto [sic] parent.

E.N.O. v. L.M.M., 711 N.E.2d at 891.

Amici propose the following standard to determine *de facto* parenthood to ensure that states do not impermissibly interfere with parental autonomy and to balance the rights of individuals who have established a parent-like relationship with the child. A *de facto* parent will be able to demonstrate:

> (i) a significant mutually affectionate bond with the child; and
>
> (ii) a relationship enduring over considerable time that is significant in light of the child's age, developmental level and other circumstances; and

> (iii) a bond formed for reasons primarily other than financial compensation, and with the consent of the legal parent or as a result of the unavailability or inability of any legal parent to perform caretaking functions; and
>
> (iv) the performance of ongoing caretaking functions, such as attending to the child's daily needs, assisting with or arranging the child's educational needs, assisting the child to develop and maintain interpersonal relationships, acting in the child's welfare, assisting with the child's behavioral development and disciplinary needs, arranging for the child's health care needs.

Where an individual has played a parent-like role in a child's life and continuation of that relationship serves the best interest of the child, third party visitation statutes such as Washington's satisfy the state's compelling interest in protecting the welfare of the child and use the narrowest means necessary to do so. *See, Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) ("the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association . . . .").

In determining the best interest of the child, Washington laws require courts to consider abuse, domestic violence, alcohol and drug abuse and other causes for

restricting residential time. *See*, R.C.W. 26.09.191(2)(a)[4]. To ensure that parents have the ability to raise concerns regarding the *de facto* parent's ability to safely parent the child, the same considerations should apply to determine visitation petitions between legal parents and *de facto* parents. When third party visitation statutes such as Washington's are narrowly applied to *de facto* parents who establish that visitation is in the child's best interest, they are constitutional.

III. NARROWLY CIRCUMSCRIBING COURT ACCESS BY THIRD PARTIES IS ESSENTIAL TO PROTECT PARENTAL AUTONOMY.

Absent a showing of *de facto* parenthood,[5] the state may not constitutionally require that the parent provide visitation with the child, even if the visitation were to be in

[4] The pertinent section of the statute is provided for the convenience of the Court as Appendix B.

[5] *Amici* take no position in this case as to whether an individual who has not established a *de facto* parent relationship with a child, but nonetheless has established a substantially significant relationship with the child, should be permitted to seek visitation. However, *Amici* believe that the court should award visitation in those cases only if the third party can meet narrowly crafted and distinct factors that the court must consider beyond mere best interest of the child. The application of a higher substantive standard to third parties is necessary to protect the parent's constitutional right to parental autonomy and to overcome problems inherent in the broad application of these statutes, as explained in section III, pp. 12 - 25. This question is not before the Court today.

the child's best interest. As the Washington Supreme Court found, allowing visitation under such circumstances would force parents to defend against any third party petitioners who sought to maintain contact with a child. *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998). Limited application of third party visitation statutes to *de facto* parents minimizes the problems inherent in a statute that gives courts unfettered discretion. This limitation decreases judicial usurpation of parental decision-making and the harmful airing of family disputes. Application to *de facto* parents also limits potential risks to domestic violence victims and their children and minimizes the gender bias in decision-making. Finally, courts' failure to properly analyze the relationship between the third party and child, and the economic hardship to single mothers opposing visitation, buttress the argument for narrow application of third party visitation statutes.

III. A. LIMITED APPLICATION OF VISITATION STATUTES TO *DE FACTO* PARENTS MINIMIZES JUDICIAL USURPATION OF PARENTAL DECISION-MAKING.

Parental decision-making must be protected from interference by those whose relationships with the children are characterized by occasional visits, communications or

overnight stays. These relationships do not demonstrate the level of care, participation and affection required to permit courts to override parental decision-making.

> Some parents and judges will not care if children are physically disciplined by the grandparents; some parents and judges will not care if the grandparents teach children a religion inconsistent with the parents' religion; some judges and parents will not care if the children are exposed to or taught racist beliefs or sexist beliefs; . . . But some parents and some judges will care. Between the two, the parents should be the ones to choose not to expose their children to certain people or ideas, and without a showing that this deprivation has harmed the child in some way beyond a per se disassociation with the grandparents, the family's private decision-making should not be tried in a court of equity. Instead, the grandparents' request and justification for visitation should be subject to scrutiny and should be proved necessary to the welfare of the child.

Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. Louisville J. Fam. L.393 (1985-86).

This case demonstrates the validity of *Amici's* argument that application of visitation statutes should be limited to individuals who can establish a *de facto* parental relationship with a child. Here, the mother preferred the children not have overnight visits at their grandparents'

home; indeed, prior to their father's death, the children had never done so without their father being present. Pet. Brief at 2-3. By requiring that the mother provide overnight visits despite her own beliefs about what is in her children's best interest, the court imposed its notion of best interest of the child in place of the mother's.

Application of third party visitation statutes to those individuals who demonstrate a *de facto* parental relationship would limit judicial override of parental decision-making to those cases where competing parental rights justify the state's compelling interest in interfering with parental autonomy.

III. B. BROAD APPLICATION OF THIRD PARTY VISITATION STATUTES WILL FORCE PARENTS TO DEFEND AGAINST UNDESERVING APPLICANTS AND RESULT IN HARMFUL AIRING OF FAMILY DISPUTES.

Allowing third party petitions by persons without a *de facto* parental relationship will force parents to defend against petitions by undeserving applicants, such as an abusive ex-partner who exploits the court system to continue his pattern of control over his victim. A batterer deprived of the opportunity to physically abuse his victim will wreak emotional and financial havoc on his victim. When third party visitation statutes are permissively

applied, the law empowers the batterer to manipulate the court system. The batterer may convince his parents to seek visitation with his child so he can seize visitation beyond that awarded in the divorce proceedings. *See*, *Drennen v. Drennen*, 557 N.E.2d 149 (Ohio App. 1988) (court upheld denial of visitation to paternal grandparents who had close relationship with violent father and had allowed father unsupervised access to child in violation of agreement); *Hughes v. Hughes*, 463 A.2d 478 (Pa. Super. 1983) (appellate court upheld denial of visitation to paternal grandmother, believing it was a ruse and "an attempt to gain through the back door what is not possible by the front"). Whether the grandparents are ultimately successful in their efforts is irrelevant: the mother will have already suffered unwarranted economic and emotional hardship in defending her parenting decisions in court.

Additionally, third party visitation statutes that are broadly applied open the door to the harmful airing of family discord. A hypothetical case: two parents agreed between themselves that the maternal grandparents would never have unsupervised or unlimited visitation with their grandchild because of the mother's molestation by the grandfather. The mother never disclosed this abuse to her parents or other family members. Upon the mother's death,

the maternal grandparents sought unsupervised visitation. The broad application of third party visitation statutes such as Washington's would force the father to divulge the sexual molestation to protect his child. While a court might ultimately deny visitation, the hearing itself would be harmful. *See*, Pet. Brief at 6, n.10 (Petitioners concur that even in the instant case the public airing of family disputes would complicate relations between the individuals involved).

III. C. STATUTES THAT GIVE COURTS UNFETTERED DISCRETION OFTEN RESULT IN GENDER-BIASED DECISIONS.

Broad application of third party visitation statutes that are not limited to those third parties who have established a *de facto* parental relationship with the child also implicitly allow gender biases to influence trial court decisions. Petitioners would have this Court believe that trial judges apply these broad statutes reasonably and consistently. Pet. Brief at 13-17. In fact, what too often determines the outcome is the gender of the parent opposing the visitation. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 Conn. L. Rev. 1315, 1333-34 (1994). "In defining the best interests of the child in the custody of a

single mother, courts frequently ignore a mother's opinion about the people with whom the child should spend time." *Id.* at 1334.

When analyzing whether to allow visitation over a parent's objection, courts defer less to mothers than to fathers. Courts frequently decide that the mother cannot deny the grandparents access to the children based on the courts' belief that such relationships are important. This is true even when there is animosity between the parties. In too many cases, courts fail to scrutinize the extent of the grandparents' involvement in the child's life.[6] *Id.* at 1335-36.

In contrast, courts show deference to fathers, allowing visitation over a father's objections only if the grandparents cohabited or were closely involved with the child. Even when the grandparents have been significantly involved in the child's life, courts still deny visitation if the animosity between the father and the grandparents is deemed too great.[7] *Id.* at 1343.

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[6] *See, Johansen v. Lanphear*, 464 N.Y.S.2d 301 (N.Y. App. Div. 1983); *Commonwealth ex rel. Miller v. Miller*, 478 A.2d 451 (Pa. Super. Ct. 1984); *Barry v. Barrale*, 598 S.W.2d 574 (Mo. App. 1980).

[7] *See, Commonwealth ex rel. Zaffarano v. Genaro*, 455 A.2d 1180 (Pa. 1983); *Kudler v. Smith*, 643 P.2d 783 (Col. Ct. App. 1981); *Cockrell v. Sittason*, 500 So. 2d 119 (Ala. Civ. App. 1986); *Benner v. Benner*, 248 P.2d 425 (Cal. App. 1952); *In re Marriage of Weddel*, 553

Thus the purportedly gender-neutral legal framework operates in a gender-biased fashion.[8] This often results in male judges expropriating women's choices. "Gender is fundamental to views of sexual difference in our culture; judges cannot be free of gender associations." Steven H. Miles and Allison August, *Courts, Gender and the "Right-to-Die,"* 18 Law, Medicine and Health Care 85, 92 (1990). Given the potential for gender bias in these cases, this Court should prohibit the broad application of visitation statutes to individuals who cannot demonstrate a *de facto* parental relationship with the child.

N.E.2d 213 (Ind. Ct. App. 1990); *Olepa v. Olepa*, 391 N.W.2d 446 (Mich. Ct. App. 1986).

[8] The gender bias identified by Czapanskiy, while disturbing, is not surprising when other "neutral" standards are analyzed with a critical eye. For example, the Washington State Supreme Court, years before other states recognized the Battered Women's Syndrome, assessed whether in self-defense claims the "reasonable man" standard was sufficiently neutral to encapsulate a women's perspective of "reasonable". In its decision, the court found that the "neutral" standard did not incorporate the perspectives of women. *State v. Wanrow*, 559 P.2d 548 (Wash. 1977). Thus, the court recognized that legal standards appearing neutral at first often work against women in application.

A similar outcome was found in a study of right-to-die cases conducted by Dr. Steven Miles. Steven H. Miles and Allison August, *Courts, Gender and the "Right-to-Die"*, 18 Law, Medicine and Health Care 85 (1990). In that study, Dr. Miles identified 22 appellate court decisions in which courts were asked to reconstruct the wishes of legally incompetent individuals. Although all the individuals had said essentially the same thing to family and friends regarding their desires if ever in a vegetative state, Dr. Miles found that the courts applied the

III. D. ASSUMPTIONS ABOUT THE BENEFITS OF GRANDPARENT VISITATION FREQUENTLY RESULT IN INTRUSIONS UPON PARENTAL AUTONOMY.

In assessing a request for grandparent visitation, courts often articulate assumptions that all grandchildren benefit from a relationship with their grandparents and that visitation is in the best interest of the child.[9] These beliefs buttress courts' opinions that grandparent visitation statutes are constitutional. Courts essentially heighten the rights of grandparents to constitutional stature. This reasoning makes it difficult for parents to successfully challenge a request for grandparent visitation.

By assuming that visitation by grandparents is automatically in the best interest of children, courts unwittingly shift to the parent opposing visitation the burden of showing that such visitation is not in the child's best interest. Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent*

"neutral" evidentiary standards differently to men and to women. *Id.* at 87.

[9] *See, Frances E. v. Peter E.*, 479 N.Y.S.2d 319, 323 (N.Y. App. Div. 1984); *Commonwealth ex rel Miller v. Miller*, 478 A.2d 451, 455 (Pa. Super. 1984); *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992); *Herndon v. Tuhey*, 857 S.W.2d 203, 210 (Mo. 1993); *Campbell v. Campbell*, 896 P.2d 635, 643 (Utah App. 1995); *Sightes v. Barker*, 684 N.E.2d 224, 230-31 (Ind. App. 1997); *Roberts v. Ward*, 493 A.2d 478, 482 (N.H. 1985).

Visitation Cases, 40 Okla. L. Rev. at 78. Instead, courts should analyze the nature of the relationship between the third party and the child. Only individuals who demonstrate a) a *de facto* parental relationship with the child and b) that visitation is in the best interest of the child should be awarded visitation over a parent's objection.

Equal application of third party visitation statutes to third parties and to *de facto* parents can often lead to absurd results. Awarding visitation to the first person to court may foreclose the opportunity of latecomers who establish a *de facto* parental relationship from obtaining visitation. Ultimately, parents will be unable to juggle the multiple demands visitation places on the family's life and courts will be forced to deny or reconfigure visitation for the wrong reasons.

As families and society evolve, "the nuclear family on which children in the past relied has become less common; '[m]ore varied and complicated family situations arise as divorces, and decisions not to marry, result in single-parent families, [and] as remarriages create step-families', making relationships with other family members all the more important." Pet. Brief at 9, quoting *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985). Petitioners' observation demonstrates the competing and never-ending

demands that may be placed on parents attempting to direct and control their own and their children's lives. Forcing parents to defend visitation attempts by any family members who play a role in or believe they are important in the child's life will "result in chaos for parents as they attempt to rear their children." *King v. King*, 828 S.W.2d 630, 635 (Lambert, J., dissenting).

While the grandparent-grandchild relationship may be important and pleasurable, it does not inherently rise to the level of significance in the child's life to warrant intrusion into constitutionally protected parental autonomy. Only where the grandparent has played a *de facto* parenting role in the child's life is the relationship entitled to constitutional protection. Czapanskiy, 26 Conn. L. Rev. at 1324.

Petitioners claim that the Fourteenth Amendment was never intended to prevent other family members from participating in family life, and that many communities, foster participation in family life by grandparents and other family members. Pet. Brief at 30-32 (noting such participation in Asian-American and Native American families). The Constitution cannot prohibit communities from voluntarily relying on extended family decision-making and participation. In fact, *Amici's* analysis would

allow those family members in these communities who have played a *de facto* parental role in the child's life to seek visitation. *Amici* are keenly aware of this concern because of their work with African-American grandmothers raising their grandchildren in the indefinite or permanent absence of the intervening generation. With these communities in mind, *Amici* submit that application of the statute is constitutional only when applied to *de facto* parents. Application in this fashion will usually allow those extended family members with *de facto* parental relationships to seek, and when appropriate, obtain visitation while minimizing improper intrusions upon parental autonomy based on false assumptions of the overriding importance of grandparent-grandchild relationships.

III. E. BROAD APPLICATION OF THIRD PARTY VISITATION STATUTES CREATES AN ECONOMIC HARDSHIP FOR THE PARENT OPPOSING THE VISITATION.

Broad application of statutes such as R.C.W. 26.10.160(3) requires parents to defend third party visitation requests regardless of the relationship between

the third party and the child. Even if the parent ultimately prevails, the financial cost to the family is enormous, as are the emotional and psychological costs to all parties, including the children.

The cost of litigation disproportionately burdens single mothers, who have a higher rate of poverty than single fathers or intact families.[10] Yet because most states require a break-up in the family before grandparent or third party visitation rights are triggered, it is most often single parents who are forced to defend these cases. The single parent must then use her limited resources and hire an attorney to defend her parental autonomy and parenting decisions or must appear in court *pro se*. In 1992, in Seattle, Washington, at least one party appeared *pro se* in 76% of family law cases.[11] Parents who represent

[10] In 1991, the number of families maintained by women below the poverty level was ten times as high as those maintained by men, and families maintained by women had the lowest median income of all family types ($16,692), compared to $40,995 for married couples and $28,351 for families maintained by men. *See*, U.S. Department of Labor, Women's Bureau, *Facts on Working Women* (visited Dec. 7, 1999) <http://www.dol.gov/dol/wb/public/wb-pubs>.

[11] *See*, American Bar Association, Standing Committee on the Delivery of Legal Services, *Responding to the Needs of the Self-Represented Divorce Litigant* 1, 8, Table 2 (1994). Seattle, WA is not alone in the high percentage of *pro se* litigants in family law cases. This statistic is repeated in urban cities across the country. *Id.* (on average, in 1992, 72% of divorce cases in sixteen urban cities had at least one party appear *pro se* and when only men had an attorney, women appeared *pro se* 83% of the time). *See also*, Final Report of the

themselves usually fare the worst in court, because they do not understand the legal system and they are ill-equipped to adequately represent their interests. Thus, even if the facts of a particular case do not support an award of visitation, a *pro se* litigant is less likely to succeed in averting a harmful result. Anything short of the narrow application of third party visitation statutes will result in economic hardship for single mothers.

California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts 140, 165-166 (1977) (85% of *pro se* litigants are women).

CONCLUSION

Amici respectfully request that this Court hold that Washington's third party visitation statute R.C.W. 26.10.160(3) is unconstitutional as applied in this case. The statute is constitutional if narrowly applied to individuals who a) have a *de facto* parental relationship with the child and b) can establish that visitation is in the best interest of the child. This application of the statute will shift courts' focus from their own biases and beliefs, and from usurpation of parent's decisions, to the proper constitutional analysis and respect for principles of parental autonomy as well as recognition of alternative families, all of which are essential to our society.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Northwest Women's Law Center is a non-profit public interest legal organization dedicated to advancing the legal rights of women through litigation, education, legislative advocacy and the provision of legal information and referral services. The Law Center provides these services to women throughout Washington State and the Pacific Northwest. Since its founding in 1978, the Law Center has been actively involved in family law issues. The Law Center has worked to protect the parental autonomy rights of single parents, particularly *pro se* litigants and domestic violence victims, and to protect the best interest of children. The Law Center also fights to ensure that individuals in long-term committed relationships, regardless of sexual orientation or marital status, receive equitable treatment under the law. Additionally, the Law Center works to protect the rights of grandparents raising grandchildren. Because of our work with these diverse communities, the Law Center understands the complexity of the issues in this case and is uniquely qualified to address the Court.

The Connecticut Women's Education and Legal Fund (CWEALF) is a statewide, nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,400 individuals and organizations. CWEALF seeks to join this brief as *amicus curiae* because of our long history of work on family law issues.

The National Center for Lesbian Rights (NCLR) is a national, non-profit legal organization dedicated to securing and protecting equal rights for lesbians and their families. Since 1977, NCLR has advocated on behalf of lesbian parent families and their children in the arenas of child custody and visitation, adoption and foster parenting, and health care and other family-related benefits. NCLR has a special commitment to ensuring that children who are born and raised in lesbian parent families are afforded the same rights and protections as all others, including the right to freedom from interference by relatives and other third parties, and the right to maintain a relationship with the child's *de facto* parent in the event of the biological parent's

death or incapacity or if the relationship between the parents dissolves.

The Women's Law Center of Maryland, Inc. (WLCMD), founded in 1971, is a nonprofit, public interest, membership organization of attorneys and community members that works to establish fair treatment for women and children under our laws. The WLCMD has worked to protect and preserve the rights of women and children by educating the public and the judiciary, monitoring compliance with the law, by seeking to change unjust laws and unjust lawmaking, and by implementing innovative legal services programs to pave the way to systematic change. The WLCMD has dedicated substantial effort to reforming family law and has been recognized for its innovative direct services and effective advocacy for families via its Kaufman Center for Family Law. The WLCMD is participating as an *amicus* in this case because of the WLCMD's support for a result that will protect the rights of parents who have played substantial roles in children's lives over time, both biological and *de facto*, from third parties whose involvement in children's lives does not rise to level of parent and whose interests should not interfere with parental autonomy.

APPENDIX B

Section 26.09.191(2)(a) of the Revised Code of Washington provides in pertinent part,

> The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct:
>
> (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions;
>
> (ii) physical, sexual, or a pattern of emotional abuse of a child;
>
> (iii) a history of acts of domestic violence as defined in [Washington's law] or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or
>
> (iv) the parent has been convicted as an adult of a sex offense under [relevant provisions of Washington's criminal code].